

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 ELENA RODRIGUEZ-MALFAVON,

5 Plaintiff,

6 v.

7 CLARK COUNTY SCHOOL DISTRICT,  
8 EDWARD GOLDMAN, and ANITA  
9 WILBUR,

10 Defendants.

Case No. 2:12-cv-1673-APG-PAL

**ORDER GRANTING MOTION IN  
LIMINE**

(ECF No. 76)

11 Plaintiff Elena Rodriguez-Malfavon's remaining claim in this case asserts Title VII  
12 retaliation against defendant Clark County School District ("CCSD") based on a 2010 negative  
13 performance evaluation while she worked in the purchasing department. ECF No. 50 at 16-17.  
14 She moves to preclude at trial use of a 2011 unsatisfactory performance evaluation. She argues  
15 the 2011 performance evaluation is not relevant because it was given by a different supervisor at  
16 a different location for a different job. She also argues the evaluation is inadmissible under  
17 Federal Rules of Evidence 404(a) and (b). Finally, she contends the 2011 evaluation should be  
18 excluded under Rule 403 because it would result in a mini-trial over her performance in a  
19 different department.

20 CCSD responds that the 2011 performance evaluation and written warnings Rodriguez-  
21 Malfavon received are relevant because they tend to make it less probable that the 2010  
22 evaluation was retaliatory. Specifically, CCSD argues the two evaluations raise similar concerns  
23 about Rodriguez-Malfavon's work ethic, ability to perform assigned tasks, and failure to provide  
24 value to her employer as an administrator. CCSD also argues that even if this evidence  
25 constitutes "other act" evidence under Rule 404, CCSD should be able to present it to rebut  
26 Rodriguez-Malfavon's anticipated testimony that she had positive performance reviews in  
27 different divisions prior to joining the purchasing department.  
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1 Under Rule 404(a)(1), “[e]vidence of a person’s character or character trait is not  
2 admissible to prove that on a particular occasion the person acted in accordance with the character  
3 or trait.” Under Rule 404(b)(1), “[e]vidence of a crime, wrong, or other act is not admissible to  
4 prove a person’s character in order to show that on a particular occasion the person acted in  
5 accordance with the character.” Such evidence “may be admissible for another purpose, such as  
6 proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or  
7 lack of accident.” Fed. R. Evid. 404(b)(2).

8 The 2011 evaluation is inadmissible under Rule 404(a) because CCSD wants to admit it to  
9 show Rodriguez-Malfavon has certain character traits, such as having a poor work ethic. It is also  
10 inadmissible under Rule 404(b) because CCSD wants to admit it to demonstrate that Rodriguez-  
11 Malfavon engaged in other acts showing she is a poor employee to suggest she was also a poor  
12 employee the prior year in the purchasing department. CCSD has not argued any exception in  
13 Rule 404(b) applies. I therefore exclude the 2011 evaluation under Rule 404. *See Neuren v.*  
14 *Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1511 (D.C. Cir. 1995) (holding that written  
15 evaluations from prior employer were inadmissible under Rule 404 in sex discrimination case  
16 where the evidence was admitted to show the employee had the same performance problems at  
17 the prior employer); *E.E.O.C. v. Serramonte*, 237 F.R.D. 220, 223 (N.D. Cal. 2006) (“Work  
18 performance with other employers, either before or after the defendant employer, is inadmissible  
19 under Rule 404(a). . . .”).

20 Additionally, evidence that is otherwise admissible under Rule 404 is still subject to Rule  
21 403’s balancing of probative value against prejudicial effect. *See, e.g., United States v. Cherer*,  
22 513 F.3d 1150, 1157-59 (9th Cir. 2008). Even if the 2011 evaluation is admissible, I would  
23 exclude it under Rule 403 because it would result in a time-consuming and confusing mini-trial  
24 over Rodriguez-Malfavon’s performance at a different job working for a different supervisor.  
25 *Rauh v. Coyne*, 744 F. Supp. 1181, 1184 (D.D.C. 1990).

26 CCSD argues that even if the 2011 evaluation is inadmissible under Rule 404, CCSD  
27 should nevertheless be able to use it to rebut Rodriguez-Malfavon’s anticipated testimony that she  
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1 received positive reviews while working in other divisions prior to joining the purchasing  
2 department. Rule 404 is not a one way street. It precludes Rodriguez-Malfavon from offering  
3 evidence to show she performed well in other divisions to prove she performed well in the  
4 purchasing department. Thus, any evidence that she received positive evaluations or awards in  
5 the other divisions is inadmissible under Rule 404. *See id.* (excluding the plaintiff's witnesses  
6 from testifying about her work performance at other employers that was being offered to rebut the  
7 defendants' reason for her discharge).

8       However, this general bar does not include the positive evaluation she received in June  
9 2009 while working in the purchasing department. Because that evaluation was for work  
10 performed in the same department, it is admissible and is relevant to the issue of pretext. *See* ECF  
11 No. 50 at 12.

12       Finally, Rodriguez-Malfavon is not precluded from describing her work history and  
13 background of her employment with CCSD. She thus may identify what positions she held, when  
14 she held them, and what type of work she performed. But she may not present evidence or  
15 testimony that she received positive performance evaluations, awards, bonuses, promotions, or  
16 the like prior to her time in the purchasing department.

17       DATED this 28<sup>th</sup> day of September, 2016.



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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE